



BRAC ENVIRONMENTAL PROGRAM FACT SHEET

OFFICE OF THE DEPUTY UNDER SECRETARY OF DEFENSE (INSTALLATIONS & ENVIRONMENT)

LAND USE CONTROLS: WHAT THEY ARE AND HOW THEY ARE USED

WHAT ARE LAND USE CONTROLS?

The Department of Defense is using land use controls (LUCs) as a tool to make land use decisions consistent with the restrictions imposed on property during the environmental restoration process. The following fact sheet describes what LUCs are and how they are used.

LUCs are physical, legal, and/or administrative instruments that restrict the use of, or limits access to, contaminated real property to reduce risk to human health and the environment. The intent of LUCs is to protect the integrity of the engineering remedy and human health and the environment after transfer of the property by limiting the activities that may occur at the contaminated site.

LUCs have a long history as a tool in property law and their use in a non-environmental context is quite common. An example of an LUC in a non-environmental context is a zoning ordinance that limits the number of houses that can be built in a certain area.

USES OF LUCs IN ENVIRONMENTAL CLEANUP

- LUCs are used to ensure protection of human health and the environment.
- LUCs are used to protect ongoing remedial activities and to ensure viability of the remedy.
- LUCs are specifically provided for by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the National Contingency Plan (NCP).
- DoD has used and will use LUCs in remedial activities during cleanup and as part of a final remedy.

THE THREE TYPES OF LUCs

- **Physical mechanisms** - a variety of engineered remedies to contain or reduce contamination and/or physical barriers to limit access to property, such as fences or signs.
- **Legal mechanisms** - the use of restrictive covenants, negative easements, equitable servitudes, and deed notices that are meant to ensure the continued effectiveness of land use restrictions imposed as part of a remedial decision.
- **Administrative mechanisms** - notices, adopted local land use plans and ordinances, construction permitting or other existing land use management systems that may be used to ensure compliance with use restrictions.

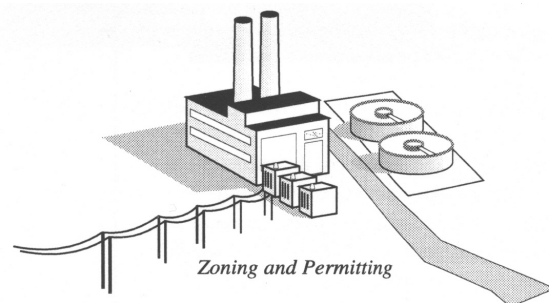
TYPES OF LUCs

LUCs fall into two categories:

- Governmental controls
- Proprietary controls

WHAT IS A GOVERNMENTAL CONTROL?

- Governmental controls are restrictions that are within the traditional police powers of state and local governments to impose and enforce.





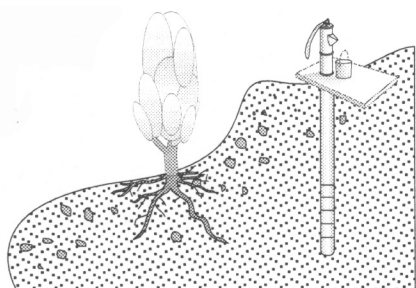
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- Permit programs and planning and zoning limits on land use are examples of governmental controls.

WHAT ARE POSSIBLE GOVERNMENTAL CONTROLS?

- **Zoning** - Use restrictions imposed through the local zoning or land use planning authority. Such restrictions can limit access and prohibit disturbance of the remedy. Zoning authority does not exist in every jurisdiction.
- **Siting restrictions** - Control land use in areas subject to natural hazards, such as earthquakes, fires, or floods. Such restrictions are created through statutory authority to require that states implement and enforce certain land use controls as well through local ordinances.
- **Groundwater restrictions** - Specific classification systems used to protect the quality of or use of ground water. These systems operate through a

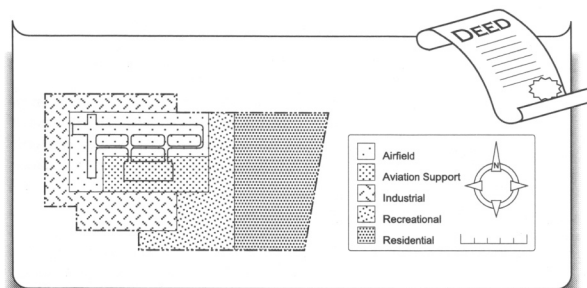


state well permitting system. Under them, criteria may be established that must be met before a use permit or construction is allowed.

WHAT IS A PROPRIETARY CONTROL?

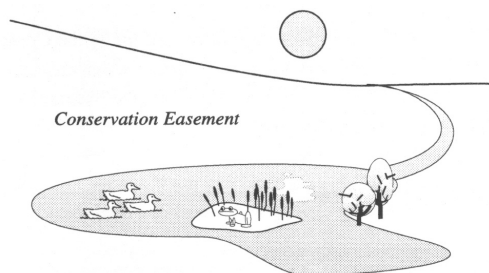
- A proprietary control is a private contractual mechanism contained in the deed or other document transferring the property.
- Proprietary controls involve the placement of restrictions on land through the use of easements, covenants, and reversionary interests. Easements, covenants, and reversionary interests are nonpossessory interests. Nonpossessory interests give their holders the right to use or restrict the use of land, but not to possess it.

- State law varies on the application and enforcement of such restrictions.



WHAT IS AN EASEMENT?

- An easement allows the holder to use the land of another, or to restrict the uses of the land. If the owner violates the easement, the holder may bring suit to restrain the owner. For example, a conservation easement restricts the owner to uses that are compatible with conservation of the environment or scenery.
- An easement "appurtenant" provides a specific benefit to a particular piece of land. For example, allowing a neighbor to walk across your land to get to the beach. The neighbor's land, the holder of the easement, benefits by having beach access through your land.
- An easement "in gross" benefits an individual or company. For example, allowing the utility company to come on your land to lay a gas line. The utility company, the holder of the easement, benefits by having use of the land to lay the gas line.



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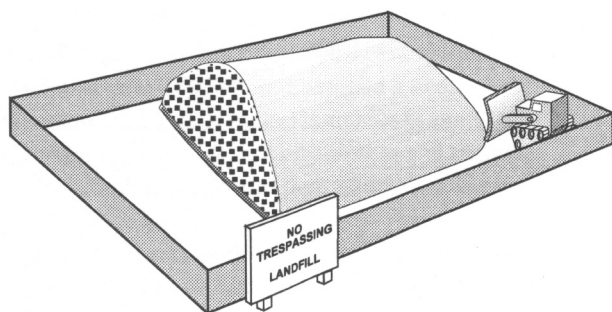
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- An affirmative easement allows the holder to use another's land in a way that, without the easement, would be unlawful—for example, allowing a use that would otherwise be a trespass.
- A negative easement prohibits a lawful use of land—for example, creating a restriction on the type and amount of development on land.

WHAT IS A COVENANT?

- A covenant is a promise that certain actions have been taken, will be taken, or may not be taken.
- Covenants can bind subsequent owners of the land. There are special legal requirements needed to bind subsequent owners.
- An affirmative covenant is a promise that the owner will do something that the owner might not otherwise be obligated to do -- for example, maintaining a fence on the property that surrounds a landfill.



We welcome and invite your comments on this fact sheet as we seek to improve the information provided.

Please send comments to:
Office of the Assistant Deputy Under Secretary
of Defense for Environment/Cleanup
3400 Defense Pentagon
Washington, DC 20301-3400

You can find this fact sheet and other information on
DoD's Environmental Cleanup Office Web site:
<http://www.dtic.mil/envirodod>

- A negative covenant is a promise that an owner will not do something that the owner is otherwise free to do—for example, restricting the use of groundwater on the land.

WHAT IS A REVERSIONARY INTEREST?

- A reversionary interest places a condition on the transferee's right to own and occupy the land. If the condition is violated, the property is returned to the original owner or the owner's successors.
- Each owner in the chain of title must comply with conditions placed on the property. If a condition is violated the property can revert to the original owner, even if there have been several transfers in the chain of title.

USING LUCs FOR HISTORIC PRESERVATION AT U.S. CUSTOMS HOUSE, BOSTON

In 1987, the Custom House in Boston was deemed excess and the General Services Administration (GSA), through special legislation, sold it to the Boston Redevelopment Authority. At the time of the sale, the GSA placed an historic preservation covenant in the deed to protect the exterior architectural and structural integrity of the building. The Boston Redevelopment Authority wanted to resell the Custom House to a developer that planned to connect it by a skyway to a building half a block away. When GSA refused to remove the historic covenant, the deal fell through. Several years later, the Marriott Corporation proposed a plan to buy the Custom House and create an urban park between the Marriott at the Wharf and the Custom House. Under the plan, the building will retain its historic appearance and will be used as one of Marriott's time-share properties. In 1999, the Custom House won the National Preservation Award.

